IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Mohanlal Soni and another v. The Director, Directorate of Urban Land & Building Tax, Jaipur & Ors.

S.B.CIVIL WRIT PETITION NO.5799/2004
under Articles 226 and 227 of the Constitution of India.

Date of Order :: 23rd October, 2007

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Vikas Balia, for the petitioners.
Mr. B.L.Tiwari, Deputy Government Advocate.

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BY THE COURT :

A Division Bench of this Court in the case of East India Hotels Ltd. and another v. The State of Rajasthan and others (AIR 2001 Rajasthan 288), while declaring Section 13(1)(b) and Section 15(b) of the Rajasthan Land & Building Tax Act, 1964 (hereinafter referred to as "the Act of 1964") ultravires to the Constitution of India, held as under:-

> "IV.In our view, when the tax under the Act of 1964 is upon the land or building; or, both, separately as units and when the property in question has already been

subjected to tax the question of any further tax liability under the Act cannot arise merely on account of the transfer of such property. Under the scheme of things contemplated in the Act, in this regard, the change in ownership is wholly inconsequential inasmuch as the tax is not on the person owning the land or building; but, on the land or building or both separately as units. The provision authorising the levy of tax under the Act on the transferee of the property on account of change of ownership is beyond the legislative competence of the State Legislature. That being the position, S. 13 (1)(b) which reads, “is acquired, by transfer or otherwise”, and Explanation that, “ “acquired by transfer or otherwise” used in clause (b) of this sub-section shall not include acquisition by inheritance”, are ultra vires the Constitution of India.

V.Section 15 of the Act provides for amendment of assessment order inter alia by reason of any change having taken place in the ownership of land and building. However, this provision is not a charging Section; and, only enables amendment of assessment on the happening of certain events. In the absence of any charging section empowering levy of tax on account of change of ownership it is not competent for the Assessing Authority to subject any property to tax merely on the basis of change in its ownership. It might be that S. 13 is a charging section creating liability to tax inter alia in cases where land or building is acquired by way of transfer. However, this charging section is applicable only where the

> property acquired by way of transfer is not already liable to pay tax. Section 3 which is the main charging section does not authorise fresh levy on transferee of the property, more particularly on the property which has already suffered tax, Clause (c) of S.3(1B) only subjects the assessee to pay tax on rebuilt or enlarged building on which one-time tax had been paid earlier to such re-building or enlargement. The provision does not speak of liability on account of transfer of property. Section 15 of the Act of 1964 will have to be read subject to S.13 and S.3 (1B) of the Act and that would only mean that amendment order under S. 15 can, if at all, in case of transfer, be passed only in cases covered under S. 13 or clause (c) of S. 3(1B) in so far as the same is necessitated due to change in ownership. That being the position, S. 13(1)(b), which reads "is acquired, by transfer or otherwise" along with Explanation "acquired by transfer or otherwise, used in clause (b) of this sub-section shall not include acquisition by inheritance", and S. 15(b), which reads "any change having taken place in the ownership of the land or building; except by way of inheritance" are beyond the legislative competence of the State Legislature."

The petitioners purchased plot No.113-B/2 (a part of plot No.113-B), PWD Colony, Jodhpur through a sale deed that was executed by Shri Rajeev Mehta and Smt. Ranjana Kiran on 29.6.1997. Prior to sale of land Shri Rajeev Mehta satisfied demand in a tune of Rs.32,000/- assessed by designated assessing authority

against one time tax as per provisions of the Act of 1964. Against same immovable property a demand was made from the petitioners under the Act of 1964 that was satisfied by payment of a sum of Rs.2,56,074/- as one time tax and a certificate dated 29.7.1999 in this regard was issued by the competent authority.

On declaration of Section 13(1)(b) and Section 15(b) of the Act of 1964 ultravires to the Constitution by this Court in the case of East India Hotels Ltd. (supra) the petitioners claimed for refund of one time tax paid by them. Despite several representations submitted by the petitioners and recommendations made by the Assistant Director, Land & Building Tax Department, Jodhpur, no action was taken, hence this petition for writ is preferred to claim refund of the tax said to be paid in excess.

With strong support of the provisions of Section 72 of the Indian Contract Act, 1872, the contention of counsel for the petitioners is that one time tax was demanded from the petitioners and paid by them under a mistake of law, thus, same deserves to be refunded. To substantiate the claim, aid is also sought on basis of law laid down by Hon'ble Supreme Court in the case of the Sales Tax Officer, Banaras and others v. Kanhaiya Lal Makund Lal Sarat (AIR 1959 SC 135) holding therein that “there is no conflict between the provisions of Section 72 on the one hand

and Sections 21 and 22 of the Indian Contract Act on the other and the true principle enunciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same."

It is further asserted that in a similar petition (T.R.Bhandari & Anr. v. State & Ors.), reported in 2001 DNJ (Raj.) 410, a Division Bench of this Court held as follows:-

> "Both the learned counsel brings to the notice of the Court that this issue has been decided by this Court in favour of the petitioner-assessee in East India Hotels Ltd. v. The State of Rajasthan & Ors., DBCivil Writ Petition No.55/1998, decided on 12.3.2001 declaring 13(1)(b) & 15(b) of the Rajasthan Land & Building Tax Act, 1963 as ultra vires the Constitution of India and the impugned assessment orders for re-determination made under those provisions were quashed.
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> Following the aforesaid decision, this petition is also allowed and the impugned assessment orders and consequential demands raised on account of re-determination of tax after payment of one time tax u/s.3(1-B) by

> the owner at particular time as a result of the transfer of the said property are quashed as the same amounts to converting the tax on property as tax on person wealth which is not within the domain of the State, and ultra vires. The amount deposited, if any, in pursuance of the impugned demands shall be refunded to the petitioner within six weeks in accordance with the provisions of the Act."

Per contra, stand of the respondents is that the provisions of Section 13(1)(b) and Section 15(b) of the Act of 1964 were declared bad by the Court in the year 2001 and one time tax was paid by the petitioner in the year 1999 i.e. quite earlier to declaration of the provisions concerned bad, thus, the payment of one time tax cannot be treated to be paid by mistake. On placing reliance upon the judgment of Hon'ble Supreme Court in the case of Godfrey Phillips India Ltd. and another v. State of U.P. & Ors. [(2005) 2 SCC 515] and Somaiya Organics (India) Ltd. and another v. State of U.P. and another [(2001)5 SCC 519], it is urged that the tax already collected under a statute that was later on declared legislatively incompetent cannot be subjected to refund.

Heard counsel for the parties.

It is not in dispute that in the case of East India Hotels Ltd. (supra) while declaring the

provisions of Section 13(1)(b) and Section 15(b) of the Act of 1964 ultravires to Constitution of India, the Division Bench of this Court did not say about prospective overruling of the provisions concerned. Hon'ble Supreme Court in the case of M.A.Murthy v. State of Karnataka and others [(2003)7 SCC 517], while dealing with the issue of prospective overruling held as follows:-

> "8.The learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath v. State of Punjab. In Managing Director, ECIL v. B. Karunakar the view was adopted. Prospective overruling is a part of the principles of constitutional canon if interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared

prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U.P. and Baburam v. C.C. Jacob.) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling."

In the case of Somaiya Organics (India) Ltd. (supra) it was held by the Apex Court as under:-

"36.It is true that the effect of a legislation without legislative competence is that it is non est. (See Behram Khurshid Pesikaka v. State of Bombay at SCR pp. 652, 653, R.M.D. Chamarbaugwalla v. Union of India at p. 940, M.P.V. Sundararamier & Co. v. State of A.P. At SCR p. 1468 and Mahendra Lal Jaini v. State of U.P. at SCR pp. 937-941.)

37.Nevertheless a law enacted without legislative competence remains on the statute-book till a court of competent jurisdiction adjudicates thereon and declares it to be void. When the court declares it to be void it is only then that it can be said that it is non est for all purposes. In Synthetics and Chemicals case the invalidity of the provisions was a

> declaration under Article 141 of the Constitution. It was for doing complete justice that the court in exercise of its jurisdiction under Article 142 moulded the relief in such a way as to give effect to its declaration prospectively. It is not possible to accept that such an order of prospective overruling is contrary to law. An invalid law has not been held to be valid. All that has happened is that the declaration of invalidity of the legislation was directed to take effect from a future date."

In view of the law laid down by Hon'ble Supreme Court in the judgments referred above, the prospective overruling is only an exception to the normal rule that the law declared bad by the Court is to be treated bad from inception. In the case of East India Hotels Ltd. (supra) it was nowhere said that the application of the judgment shall be prospective. The provisions of Section 13(1)(b) of Section 15(b) of the Act of 1964, therefore, are required to be treated ultravires to the Constitution from inception. The refund of one time tax paid by the petitioner, therefore, cannot be denied by application of doctrine of prospective overruling.

I also do not find any force in the contention of counsel for the respondents that in view of the judgments of Hon'ble Supreme Court in the cases of Godfrey Phillips India Ltd. (supra) and Somaiya

Organics (India) Ltd. (supra) the tax already collected under a statute that was later on declared legislatively incompetent cannot be subjected to refund. In both the cases referred above the refund of tax was denied on basis of doctrine of unjustified enrichment. In the instant mater the entire one time tax was satisfied by the petitioners and, therefore, the refund shall not at all be unjustified enrichment.

I also do not find any substance in the contention of counsel for the respondents that the petitioners cannot claim for refund in view of the provisions of Section 20(1) of the Act of 1964, that reads as under:-

> "20.Refund.-(1)The Assessing Authority shall, in the prescribed manner; refund to an assessee applying in this behalf the amount paid by such assessee in excess of the amount of tax due from him under this Act either by cash payment or by deduction of such excess from the amount of tax due in respect of any other period:
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> Provided that no claim for such refund shall be allowed unless ti is made within a period of two years from the date of the order of assessment or, as the case may be, within a period of one year from the date of order passed in appeal or revision or under section 21."

From a plain reading of the provisions of Section 20 of the Act of 1964 referred above, it is apparent that the same is having application for “excess of the amount of tax due”. But in the instant matter, as a matter of fact, after declaration of provisions of Section 13(1)(b) and Section 15(b) of the Act of 1964 no tax was due and the tax levied was wholly without jurisdiction.

Beside whatever stated above, a Division Bench of this Court in a similar case i.e. of T.R.Bhandari (supra) directed the respondent State to refund one time tax already deposited and I do not find any reason to deviate from the parity i.e. required to be maintained while giving directions in similar matters.

Consequently, this petition for writ is allowed. The respondents are directed to refund the one time tax levied from the petitioners for the immovable property purchased by them i.e. plot No.113-B/2, PWD Colony, Jodhpur with interest @ 3.5% per annum. The refund in the terms above is required to be made within a period of six months from today.

No order to costs.

(GOVIND MATHUR),J.

Kkm/ps.